UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

BRIAN BOWEN II, PLAINTIFF, v. ADIDAS AMERICA, INC.; JAMES GATTO; MERL CODE; CHRISTIAN DAWKINS; MUNISH SOOD; THOMAS GASSNOLA; and CHRISTOPHER RIVERS, DEFENDANTS.	NO. 3:18-CV-3118-JFA

DEFENDANTS' REPLY IN SUPPORT OF THEIR JOINT MOTION FOR LEAVE TO SUBMIT A SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTIONS TO DISMISS

Dated: August 2, 2019

The erroneous contention raised by Bowen at oral argument which Defendants sought to correct—that pleading *some* direct injury to business or property provides "access" to RICO's "statutory scheme" to seek treble damages for any and all harms suffered, regardless of whether they independently satisfy RICO's standing requirement, (Tr. 59:4–6)—was not made in Bowen's opposition to Defendants' motions to dismiss. Bowen does not argue otherwise. And, as he acknowledges, Defendants at the hearing rebutted Bowen's mischaracterization. (*Id.* 82:8–12). Once the argument transcript was available, Defendants moved to provide the Court with supporting authority fully clarifying the applicable law on this important issue. It is well established that parties may file supplemental briefing to address an argument raised for the first time at oral argument. *See, e.g.*, *In re Amazon.com, Inc.*, No. 14-MD-2504, 2016 WL 1268296, at *2 (W.D. Ky. Mar. 31, 2016) (permitting supplemental briefing after parties presented new arguments during oral argument), *aff'd sub nom.* 852 F.3d 601 (6th Cir. 2017); *United States v. Shoals*, No. 05-CR-64, 2006 WL 1457707, at *1 (N.D. Ind. 2006) (permitting government to supplement prior briefing to respond to new case cited by defense counsel during oral argument).

Bowen addresses the merits of Defendants' supplemental brief, but he cannot dispute the basic legal principle that Defendants moved to clarify: A civil RICO plaintiff has standing to recover ***only*** for damages to business or property interests directly caused by the alleged violation. Although he concedes this point, (*see* Opp. 2), Bowen suggests that the Court should not concern itself "at the pleadings stage" with whether some claimed injuries are recoverable under RICO and some are not, (*id.* 7). With respect, that is precisely the standing issue that must be addressed at the pleadings stage. As the passage in *Sedima* quoted by both parties makes clear, the harm a civil RICO plaintiff alleges ***is*** an issue of standing. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) ("[T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the

violation."); *see also id.* at 497 (referring to "*recoverable* damages" (emphasis added)). Thus courts must—and therefore routinely do—address on a motion to dismiss whether a civil RICO plaintiff has standing to pursue *each* alleged harm.

Bowen provides no support for his position that the Court should wait until summary judgment to consider whether each of the harms alleged in the Complaint satisfies RICO's standing requirement, nor does any support exist. He acknowledges that other courts, including the *Warnock* and *Korman* decisions cited in Defendants' supplemental brief, address RICO standing for each category of alleged damage. He counters only that this assessment should be limited to where "it is plainly obvious that none [of a plaintiff's injuries] are redressable under RICO," (Opp. 7), a standard Bowen simply invents and which is found nowhere in the cases themselves. And Bowen's attempt to distinguish *Castellanos* because it was a summary judgment decision overlooks that the defendants in that litigation did not move to dismiss, and thus summary judgment was that court's first opportunity to evaluate which injuries were viable and which should be dismissed. Nothing in the court's evaluation of that question suggests that this inquiry is reserved until after discovery.

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